



**MB v BBA (Civil Appeal (Application) 181 of 2020)  
[2023] KECA 1236 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1236 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) 181 OF 2020  
MSA MAKHANDIA, JA  
OCTOBER 6, 2023**

**BETWEEN**

**MB ..... APPLICANT**

**AND**

**BBA ..... RESPONDENT**

*(An application for extension of time to file an application out of time and the application be deemed to be properly filed, from the Judgment and Decree of the Court of Appeal of Kenya at Nairobi (Murgor, Kantai & Lesit, JJ.A.) dated 28th April 2022 in Civil Appeal No. 181 of 2020)*

**RULING**

1. By a Notice of Motion dated July 26, 2022, made under among others rule 4 of this Court’s Rules, the applicant, BBA, seeks extension of time in order to file an application for leave to appeal to the Supreme Court. That the application be deemed to be properly filed, and that the costs of this application be in the appeal. The intended appeal arises from the judgment and decree of this Court (Murgor, Kantai & Lesit, JJA) delivered on April 28, 2022.
2. The motion is made on six grounds set out on the face of the motion. A summary of those grounds, which are also deposed to in the applicant’s supporting affidavit are that the judgment, the subject of the intended appeal was delivered when the applicant had travelled out of the Country to attend to a family emergency in London which took him some time and when he came back, he was immediately taken ill and diagnosed with some ailment that took a tall order on him, thus, making it difficult for him to read and digest the judgment so as make a decision whether or not to appeal. The delay in filing the application for leave to appeal to the Supreme Court was therefore occasioned by factors beyond the applicant’s control. That the intended appeal involves a matter of general public importance as the Superior Court will be called upon to determine whether the mere inclusion of a party’s name on the title deed without any monetary contribution on his/her part entitles that person to half share of the property.



3. The respondent did not file a response to the application. Both parties however filed written submissions. The applicant while relying on the case of [\*Muringa Company Limited vs Archdiocese of Nairobi Registered Trustees \[2020\] eKLR\*](#) submits that there was a delay of 74 days from the date of judgment to the filing of the current application and the reasons for the delay have been explained, hence the delay was not deliberate but excusable.
4. On the success of the intended appeal, the applicant submits that the ground raised above amongst others requires a decisive decision from the Supreme Court. On the degree of prejudice to the respondent, the applicant submits that the dispute relates to land and the respondent will not be prejudiced at all, as his interests are fully protected.
5. On her part, the respondent opposes the application. While relying on the cases of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi, Civil Application No Nai 255 of 1997 (UR)* and [\*Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet \[2018\] eKLR\*](#), she submits that while she does not contest that the applicant was out of the Country and or his sickness, she maintains however that the applicant had not demonstrated how either of the above-stated factors hindered him from reading the judgment and making the decision to appeal. Further, that the computation of time does not add up as the applicant stated that he came back to the Country on June 4, 2022 yet the medical reports annexed to the application are dated June 15, 2022. Yet this application was filed on July 26, 2022. These gaps in time are not explained. The respondent in the premises submits that the applicant is not being candid with the court.
6. I have given due consideration to the application, the affidavits filed, submissions made, authorities cited, and the law. The mandate of this Court to extend time is derived from rule 4 of this Court's rules. The rule allows this Court, for sufficient reasons, to extend the timelines in the rules. The factors to be considered when determining such an application are found in various judicial pronouncements of this Court and the Supreme Court. In [\*Paul Wanjobi Mathenge vs Duncan Gichane Mathenge \[2013\] eKLR\*](#) this Court discussed those factors as follows:

' The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance...'
7. The Supreme Court in [\*Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others \[2014\] eKLR\*](#) laid down the principles that govern the exercise of discretion in applications for extension of time as follows:
  - ' 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;



5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.'
8. I have considered the application in light of the above principles. The first question to be answered is whether the applicant has tendered a satisfactory explanation for the delay in filing the application. The judgment which the applicant intends to appeal against was delivered on April 28, 2022. However, the applicant was unable to lodge the application for leave to appeal to the Supreme Court within time. The explanation tendered by the applicant is that he had travelled for a family emergency in London and when he came back he was immediately taken ill and the medical reports have been exhibited as evidence. That his advocate did not inform him of the judgment until on June 4, 2022 and as such some of the delay is attributable to the advocate.
9. On mistakes allegedly arising out of the inaction of a party's advocate, this court in [\*Rajesh Rughani vs Fifty Investments Limited & Another \[2016\] eKLR\*](#) stated as follows:
- 'In *Habo Agencies Limited vs Wilfred Odhiambo Musingo [2015] eKLR* this Court stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. In *Mwangi vs Kariuki (199) LLR 2632 (CAK) Shah, JA* ruled that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude.'
10. In the case at hand, the applicant cannot be said to have been indolent because he followed up the matter with his advocate to find out the status of his case. It would have been different had the applicant taken a long period of time before following up the matter with his advocate. Mere allegation of counsel's indolence is not enough to warrant grant of extension of time. It must also be seen that parties on their part were not careless. The applicant herein moved within reasonable time to follow up on the matter and instructed counsel to file the instant application without unreasonable delay. The delay cannot therefore be said to be inordinate in the circumstances.
11. In my view, the explanation tendered by the applicant is plausible and sufficient. Additionally, I note that the delay occasioned was partly attributable to his advocate who did not inform the applicant of the judgment immediately after it was delivered. He could have done so either by phone or any other means of communication. He need not have waited until the applicant returned to the Country so as to let him know about the judgment. The applicant cannot therefore be wholly blamed for the delay. Without evidence to the contrary, I am unable to find carelessness in the actions of the applicant hence the explanation proffered for the delay is plausible.
12. The next question is whether there will be any prejudice suffered by the respondent if the orders sought are granted. I am aware that the interest of justice demands that parties be accorded every reasonable and available opportunity to ventilate their grievances within the available ranks of our judicial system. That is what the applicant seeks to do. The judgment did not make the respondent homeless. This reprieve cures the prejudice that might be visited upon him as he awaits the outcome of the appeal. In finding as such, I rely on the case of [\*Muchungi Kiragu vs James Muchungi Kiragu and Another \[1998\] eKLR\*](#).



13. That leaves me with the decisive issue as to whether the intended appeal is arguable with the possibility of success. To this, the applicant states that there are two conflicting positions on the issue of ownership where two parties are jointly registered in a title deed. While I have no jurisdiction to go into the possible merits or demerits of the intended appeal, suffice to observe that the issue raised is arguable. See [\*Athuman Nusura Juma vs Afwa Mohamed Ramadhan, CA No 227 of 2015 \(UR\)\*](#).
14. The application therefore has merit and is for allowing. The applicant has 21 days within which to file an application for certification to the Supreme Court. I make no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

